86-688

No. 86-

In The

Supreme Court of the United States

October Term, 1986

JAMES G. RICKETTS, *et al.*,

Petitioners,

vs.

ROBERT WAYNE VICKERS,

Respondent,

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *Hopper v. Evans*, 456 U.S. 605 (1982), must a federal appellate court reviewing a capital case accord a presumption of correctness under 28 U.S.C. § 2254(d) to the state supreme court's factual determination that a defendant has not produced sufficient evidence to warrant an instruction on a lesser-included offense especially when the federal court has found no constitutional deficiency in the standard used by the state court?

2. If the state court's finding is entitled to a presumption of correctness, by what standard may the federal court override the state court finding?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

JUDGMENT SOUGHT TO BE REVIEWED

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Arizona Attorney General, on behalf of the State of Arizona and James G. Ricketts, Director, Department of Corrections, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on the 27th of August, 1986, and the Motion for Rehearing denied on the 23rd of September, 1986.

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OPINION BELOW

The Ninth Circuit's panel decision held that Robert Wayne Vickers was entitled to a lesser-included instruction upon second-degree murder. Without expressly so stating, the opinion clearly implicitly holds that whether a defendant has produced sufficient evidence to warrant a lesser-included instruction is a matter of federal law, and that a federal appellate court need not give any deference whatsoever to a state supreme court's finding of fact that the defendant did not present enough evidence to warrant a lesser-included instruction.

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STATEMENT OF JURISDICTION

Robert Wayne Vickers appealed the order of the United States District Court for the District of Arizona denying his application for writ of habeas corpus under

28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

The Ninth Circuit entered its opinion reversing August 27, 1986, and denied rehearing September 23. This petition is timely filed within 60 days of the order denying the motion for rehearing. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The pertinent part of the Fourteenth Amendment:

> Nor shall any state deprive any person of life, liberty, or property without due process of law . . . .

STATEMENT OF FACTS

Robert Wayne Vickers slept late and missed lunch October 3, 1978. When he woke up, he was angry with his cellmate, Frank Ponciano, because Ponciano failed to wake him for lunch and drank Vickers' kool-aid. A correctional officer making a check of the cell block at 2 a.m. October 4, noticed that Vickers and Ponciano were still awake. When corrections officer Neil Malone made a 5 a.m. check,

Vickers attracted his attention. Vickers said: "Get this stinking son-of-a-bitch out of my cell." When Malone asked what was wrong, Vickers stuck a lighted cigar to the sole of one of Ponciano's feet, and replied, "I think he died last night." After officers removed Ponciano's body, they observed 10 to 12 puncture wounds in his back and sides, and cuts on his back spelling out "Bonzai," defendant's prison nickname. Later examination of Ponciano's body revealed bruise marks encircling his neck. The autopsy report stated as the cause of death manual and ligature strangulation. A search of Vickers' cell revealed a strip of cloth torn from a sheet with a knot in it; a yellow toothbrush with the handle melted to a point and stained red was also discovered in his property box.

Later the morning of October 4, 1978, after he was informed of his *Miranda* rights, Vickers said it was possible that he killed Ponciano but that he did not remember it. That same afternoon, Kent Spillman, a psychology associate working at the prison, was assigned to conduct a mental status examination at the request of the institutional administrator. In the course of that examination, Spillman asked Vickers whether he had killed Ponciano. Vickers replied: "Do you mean premeditated?" When Spillman replied affirmatively, Vickers smiled and said, "Yes." He then described how he had made a garrote out of the torn bed sheet, choked the victim, and later stabbed him.

Vickers defended upon the ground of insanity, and testified at trial that he did not remember what happened in his cell. He denied making incriminating statements to Spillman. His defense counsel did not request an instruction on second-degree murder, and the trial court did not

give one. The jury convicted of first-degree murder. The Arizona Supreme Court affirmed the trial court's finding of four aggravating circumstances and no mitigation, and the death penalty. *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315 (1981). In affirming, the Arizona Supreme Court noted that, under this Court's decision in *Beck v. Alabama*, 447 U.S. 627 (1980), a trial court would have to give a lesser-included instruction whenever the evidence warranted it even if defense counsel had not requested one. Having considered *Beck*, the Arizona Supreme Court held that, under all the evidence, even if defense counsel had requested a second-degree murder instruction, he would not have been entitled to it. The Arizona Supreme Court clearly stated that because Vickers defended on the grounds of insanity, and the state's evidence plainly established premeditation, Vickers was either guilty of first-degree murder or nothing. 129 Ariz. at 513, 633 P.2d at 322.

Vickers sought habeas corpus relief in district court. The district court denied all his claims, and agreed with the Arizona Supreme Court that the evidence did not warrant a second-degree murder instruction.

August 27, 1986, a panel of the Ninth Circuit reversed, disagreeing with both the Arizona Supreme Court and the district court by concluding that the evidence would have supported an instruction upon second-degree murder. The opinion of that court is attached as Appendix A to this petition. The Ninth Circuit also relied upon *Beck v. Alabama*, but did not even mention the Arizona Supreme Court's factual finding that the evidence did not support an instruction on second-degree murder, nor give any

deference to that finding under 28 U.S.C. § 2254(d). *Vickers v. Ricketts*, 798 F.2d 369 (9th Cir. 1986) (Appendix A to this petition). Petitioners moved for rehearing, pointing out that Alabama in the *Beck* case *conceded* that, as a matter of state law, Beck would have been entitled to a lesser-included instruction if it had not been for the peculiar preclusionary clause of Alabama's capital murder statute. Petitioners further pointed out that Arizona not only had never conceded that there was sufficient evidence for a lesser-included instruction, but that the Arizona Supreme Court had made an explicit factual finding in its opinion to the contrary. The Ninth Circuit denied rehearing September 23. (Appendix B to this petition.)

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REASONS FOR GRANTING THE WRIT

1. Where a state supreme court in a capital case has made a factual finding that the evidence adduced at trial did not support the giving of a lesser-included instruction, does a federal appellate court owe that finding a presumption of correctness under 28 U.S.C. § 2254(d)?

2. If a federal reviewing court owes a presumption of correctness to the state court's explicit finding about the quantum of evidence, by what standard should the federal court review that finding?

DISCUSSION

In *Beck v. Alabama*, 447 U.S. 625 (1980), Alabama conceded that, as a matter of state law, Beck would have been entitled to an instruction on felony-murder if it

had not been for the peculiar preclusionary clause of the Alabama capital murder statute. *Id.* at 630. Against that background, this Court held that, as a matter of due process, a defendant in a capital case was entitled to a lesser-included offense when the evidence established that he was obviously guilty of a serious offense, but left some doubt with respect to an element of a capital offense. *Id.* at 637. Beck testified at trial and described his participation in the robbery of 80-year-old Roy Malone. However, he consistently denied that he intended to kill the man or that he killed him. *Id.* at 629-30. Beck did not defend upon the basis of insanity. This Court did not have before it the question posed by the case at bar: when the state supreme court determines that, as a matter of state law, the defendant has *not* produced a sufficient quantum of evidence to warrant a lesser-included instruction, must a federal reviewing court give that finding a presumption of correctness under 28 U.S.C. § 2254(d)? This Court had no occasion to address that question in *Beck* because Alabama conceded that, in a non-capital case, Beck would have been entitled to such an instruction as a matter of state law.

Arizona made no such concession in the case of Robert Wayne Vickers. Indeed, the Arizona Supreme Court made an explicit finding to the contrary in its published opinion. Justice Stevens, writing for this Court in *Beck,* included a lengthy footnote indicating that the states varied in their descriptions of the quantum of evidence necessary to give rise to a lesser-included instruction, although they agreed that an instruction must be given when supported by the evidence. *Id.* at 637 n.12. The inclusion of such a note would have been pointless unless this Court was at least tacitly acknowledging that the

determination whether the defendant had produced sufficient evidence to warrant a lesser-included instruction was, at least initially, a state-court determination.

Two years later in *Hopper v. Evans,* 456 U.S. 605 (1982), former Chief Justice Burger, rejecting Evans' claim that he was entitled to a lesser-included instruction, said:

> *Beck* held that due process requires that a lesser-included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser-included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict the defendant of any crime fairly supported by the evidence. *Under Alabama law,* the rule in noncapital cases is that a lesser-included offense instruction should be given if "there is any reasonable theory from the evidence which would support the position." *Fulghum v. State,* 291 Ala. 71, 75, 277 S.2d 886, 890 (1973). The federal rule is that a lesser-included offense instruction should be given "if the evidence will permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States,* 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973). The Alabama rule clearly does not offend federal constitutional standards, *and no reason has been advanced why it should not apply in capital cases.*

456 U.S. at 611-12 ("only" emphasized in original). That language makes it perfectly plain that this Court applied Alabama's law to determine if Evans had produced enough evidence to warrant a lesser-included instruction. Thus, we are left with the conclusion that, if the state

standard for evaluating the evidence does not offend federal principles, it should be applied.

But the crucial question this Court did not answer in *Evans,* although it agreed with the Alabama Supreme Court's finding, is whether the state supreme court finding about quantum of evidence is entitled to the presumption of correctness under 28 U.S.C. § 2254(d). That seems to be implicit in this Court's decision in *Evans,* but the Court did not articulate it. That was probably because Evans' testimony about having shot the victim in the back, and his avowed intent to kill again under similar circumstances, was so egregious that this Court did not have to consider a presumption of correctness. Under those facts, no one could have seriously argued to the contrary.

But what was unnecessary for this Court to reach in *Beck* and *Evans,* is a recurring problem when federal appellate courts review evidentiary rulings by state supreme courts in capital cases. If, as *Beck* suggested, and *Evans* stopped just short of stating, the state rule about quantum of evidence necessary to justify the instruction ought to be applied if it does not offend federal notions, then it is plain that the Ninth Circuit has erred in this case. In spite of the clear holding of the Arizona Supreme Court that, under Arizona law, Robert Wayne Vickers was not entitled to a lesser-included instruction, the Ninth Circuit has simply ignored that holding and rendered its own evaluation of the evidence. In so doing, the Ninth Circuit has given no reason why the Arizona test for determining lesser-included instructions offends federal principles—indeed it did not address the issue at all. But

this Court's opinion in *Evans* unequivocally shows that, if the state standard does not offend federal principles, it ought to be followed.

The Arizona Supreme Court, cognizant of the *Beck* decision, held that it was not necessary to reverse Vickers' conviction because, even if his counsel had requested a second-degree murder instruction, the trial court would not have been required to give it. Looking at the evidence as a rational jury would have, the Arizona Supreme Court noted the most salient points, which were conceded by the Ninth Circuit in its opinion. The evidence of premeditation was extremely strong and Vickers defended on the basis of insanity. The Arizona Supreme Court decided that, if the defendant was sane, the killing was obviously premeditated because the bed sheet had been torn and formed into a garrote ahead of time. That court noted the later stabbing and carving of Vickers' nickname on the victim's back as indicative of an intentional and reflective act on the part of the defendant. The significance of the carving of "Bonzai" on Ponciano's back was ignored by the Ninth Circuit.

Looking at the state's evidence, and Vickers' defense, the Arizona Supreme Court logically concluded that he was either guilty of first-degree murder or not guilty of anything. *State v. Vickers*, 129 Ariz. 506, 512-13, 633 P.2d 315, 321-22 (1981). That was a factual finding. The Ninth Circuit's opinion not only fails to acknowledge that, it does not say why the Arizona standard for evaluating the need for lesser-included instructions offends federal principles. The Arizona Supreme Court has consistently applied this same standard: if the state of the evidence is

such that the defendant is either guilty of the offense or, because of his particular defense, guilty of nothing, then the trial court need not give a lesser-included instruction. *State v. Lamb,* 142 Ariz. 463, 472, 690 P.2d 764, 773 (1984); *State v. McNair,* 141 Ariz. 475, 482, 687 P.2d 1230, 1237 (1984). The Arizona Supreme Court has clearly enunciated this standard:

> Pursuant to 17 A.R.S., Rules of Criminal Procedure, Rule 23.3, forms of verdict shall be submitted to the jury for all offenses nessarily included in the offense charged. This Court, has, however, construed "necessarily included" as justifying instruction on lesser-included offenses:
>
> > Only when there is evidence upon which the jury could convict of a lesser offense and, at the same time, find that the state had failed to prove an element of the greater crime. In other words, the state of the record must not be such that defendant can only be guilty of the crime charged or not guilty at all. When the sole defense to a charge of murder is an alibi, for example, or a plea of insanity, no instruction on included crimes is necessary. For in these cases, if the jury accepts the defendant's version of the [crime], they must acquit; if not, and the state's proof is otherwise sufficient, the only alternative is conviction of the offense charged. *State v. Schroder,* 95 Ariz. 255, 259, 389 P.2d 255, 257 (1964).

State v. Jerousek, 121 Ariz. 420, 428, 590 P.2d 1366, 1374 (1979).

Having failed to inform Arizona what was constitutionally defective about its standard for evaluating the evidence, the Ninth Circuit has given that explicit finding by the Arizona Supreme Court no deference. Instead, the

Ninth Circuit indulged in bizarre speculation that: (1) the jury might have ignored the state's admittedly strong and persuasive evidence of premeditation (the forming of the garrote and waiting until after corrections officers had made early morning rounds, and Vickers' admission the murder was premeditated); (2) the jury might also have rejected Vickers' insanity defense, but nevertheless; (3) the jury could rationally have come up with a hybrid verdict of second-degree murder. That simply defies common sense and is not a rational conclusion under all the evidence, particularly the act of carving Vickers' nickname on the victim's back, which is totally ignored in the Ninth Circuit's evaluation of the evidence.

Although respondents have found no case precisely on point, Judge Posner, writing 3 years ago for the Seventh Circuit, anticipated the specific question posed by this case:

> Finally, even if *Beck* is someday extended to non-capital cases, there will still be the question what the standard of collateral review is. Because the statute in *Beck* forbade giving a lesser-included instruction in a capital case no matter what the circumstances, the Supreme Court did not have to decide how much deference to give a state court's determination that the circumstances did not warrant such an instruction. Despite *Jackson v. Virginia*, the Court might adopt a deferential standard in recognition of the fact that giving such an instruction often harms rather than helps the defendant's chances of acquittal, and of the too little stressed fact that state courts have the same incentives as federal courts not to allow innocent people to be convicted.
>
> To transform the federal courts in the exercise of their habeas corpus jurisdiction from enforcers of specific constitutional rights to guarantors of the accuracy of state court determinations of guilt would enmesh the federal judiciary in almost every detail of

> state criminal procedure and every trial ruling, and we would regularly have to review failures to instruct on lesser-included offenses under state law as well as decide other issues unrelated to a specific federal constitutional safeguard. We shall decline this task until directed to take it up by our judicial superiors.

Nichols v. Gagnon, 710 F.2d 1267, 1271-72 (7th Cir. 1983). Even though Judge Posner refused to extend the holding in *Beck* to a noncapital case, what he said in so declining is pertinent and vital to an understanding of the federal judiciary's role in reviewing state evidentiary rulings.

It is apparent that a state supreme court's ruling about the quantum of evidence is a factual finding. This Court has said that, even in death penalty cases, mere errors of state law do not concern this Court unless they reach constitutional dimension. *Barclay v. Florida*, 463 U.S. 939, 947 (1983) By the same token, mere errors in state evidentiary rulings have never been the basis for relief in habeas corpus. Death penalty cases are unique, but this Court's holding in *Hopper v. Evans* strongly indicates that the state standard for determining quantum of evidence should be applied unless it violates some articulated federal principle. That would accord the state court's finding a presumption of correctness unless the federal reviewing court could find some valid reason in the record not to accord it that presumption. Then, this Court would face the question Judge Posner anticipated, and this case squarely places before the Court: if the state court factual finding is to be accorded a presumption of correctness, by what standard may a federal court set it aside?

CONCLUSION

Running afoul of *Sumner v. Mata,* 449 U.S. 539 (1981), the Ninth Circuit has refused to give a presumption of correctness to the Arizona Supreme Court's factual determination that the evidence did not warrant a second-degree murder instruction. That circuit has also failed to state why the Arizona standard for evaluating the necessity for such an instruction is constitutionally offensive, which violates this Court's holding in *Hopper v. Evans* that, if the state rule does not offend federal principles, it should be applied.

Thirty-eight states presently have the death penalty, and this question will be a recurring one in every federal appellate court that reviews state evidentiary rulings in capital cases. This Court should make it unmistakably clear that what it said in *Hopper v. Evans* must be followed by federal courts reviewing state evidentiary rulings unless the federal court can articulate a valid reason for not doing so. To permit the circuits to decide individually whether they will give deference to the state determination, is to invite chaos and contradiction. More importantly, it invites the federal appellate court to grant a state defendant, in essence, a second appeal, instead of limiting itself to its prope. role of reviewing the record for federal constitutional error. That is not the proper function of the federal system when it reviews a state con-

viction, even in a death penalty case. This Court should grant certiorari to make that clear.

Respectfully submitted,

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DATED October 24, 1986.

APPENDICES

APPENDIX A

Robert Wayne VICKERS,

Petitioner-Appellant,

v.

James T. RICKETTS, et al.,

Respondents—Appellees

No. 85-2396

United States Court of Appeals,
Ninth Circuit

Argued and Submitted April 16, 1986.

Decided Aug. 27, 1986

Arizona death row prisoner sought federal habeas relief. The United States District Court for the District of Arizona, William P. Copple, J., denied relief, and petitioner appealed. The Court of Appeals, Kennedy, Circuit Judge, held that due process was violated where jury was not instructed on noncapital lesser included offense, in view of evidence warranting such instruction.

Reversed.

Reinhardt, Circuit Judge, filed concurring opinion.

Edward M. Chen, Charles R. Breyer, Coblenz, Cahen, McCabe & Breyer, San Francisco, Cal., for petitioner-appellant.

William Schaffer [sic], III, Phoenix, Ariz., for respondents-appellees.

Appeal from the United States District Court for the District of Arizona.

Before KENNEDY, REINHARDT and BRUNETTI, Circuit Judges.

KENNEDY, Circuit Judge:

Robert Wayne Vickers appeals from the district court's denial of his habeas corpus petition. Appellant challenges his conviction for first degree murder and sentence of death in the Arizona state courts. We find that the state trial court's failure to instruct the jury on second degree murder violated due process principles enunciated by the Supreme Court of the United States. We must reverse the district court.

Appellant and the victim Frank Ponciano were cellmates at the Arizona State Prison. On the evening of October 3, 1978, appellant and Ponciano were in their cell. The guard on a security check at 2:00 a.m. on October 4, 1978 noticed that appellant and Ponciano were awake. Three hours later, at about 5:00 a.m., appellant attracted a guard's attention and told him to "get this stinking son of a bitch out of my cell. . . . I think he died last night." To convince the guard that he was serious, appellant prodded Ponciano's body with a burning cigar. Ponciano did not react, and examination confirmed that he was dead. His face was discolored, his neck was bruised, and there were approximately a dozen puncture wounds on his upper body. There were also a number of cuts on his back, spelling the word "Bonzai," appellant's prison nickname. Officers searched the cell and found a strip of cloth torn from a sheet with a knot in it. A makeshift knife stained red was discovered in appellant's property box. An autopsy determined the cause of death was strangulation.

Appellant was indicted and tried for first degree murder. His defense was insanity. The defense was

based on appellant's history of aggressive behavior and on expert psychiatric testimony attributing appellant's repeated acts of violence to an epileptic disorder that rendered him peculiarly susceptible to aggressive impulses. Defense counsel did not request a second degree murder instruction and no lesser included offense instructions were given. The trial judge instructed the jury that it could return any of three verdicts: (1) guilty of first degree murder; (2) not guilty; or (3) not guilty by reason of insanity. The jury returned a verdict of guilty of first degree murder. Pursuant to Arizona's capital sentencing scheme, a separate sentencing hearing was held before the trial judge. The judge sentenced appellant to death.

On direct appeal the Arizona Supreme Court upheld appellant's conviction and death sentence. *State v. Vickers,* 129 Ariz. 506, 633 P.2d 315 (1981). After the state courts denied post-conviction relief, appellant brought the instant habeas corpus action in federal district court. The district court denied the petition without an evidentiary hearing, and this appeal follows. Appellant argues that his conviction for first degree murder was in violation of due process because the jury was not given the option of finding him guilty of the lesser included noncapital offense of second degree murder even though the evidence would have supported such a verdict. We agree. The contention has a solid base in controlling precedents, and we are required to reverse. We do not address appellant's other contentions on appeal, but we note that some raise substantial questions.

In *Beck v. Alabama,* 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Supreme Court held that in capital cases where the evidence would support conviction

of a lesser included offense, the jury must be instructed to consider that alternative. The Court reasoned that where "the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater," *id.* at 635, 100 S.Ct. at 2388 (quoting *Keeble v. United States,* 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973)), the failure to give the jury the "third option" of convicting on a lesser included offense enhances the risk of an unwarranted conviction, *Beck,* 447 U.S. at 637, 100 S.Ct. at 2389. The Court stated: "Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id.* In *Hopper v. Evans,* 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982), the Supreme Court reaffirmed its holding in *Beck.* The Court emphasized, however, that due process requires a lesser included offense instruction only if fairly supported by the evidence: "*Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Id.* at 611, 102 S.Ct. at 2053 (emphasis in original).

The appeal turns, then, on whether the evidence at trial would have supported a second degree murder conviction. We conclude that such a verdict was a rational alternative based on all the evidence in the case.

Under the applicable Arizona statutes, "[a] person commits first degree murder if . . . [k]nowing that his conduct will cause death, such person causes the death of another with premeditation. . . ." Ariz. Rev.Stat.Ann. § 13-1105(A)(1) (1978). "A person commits second degree murder if without premeditation . . . [s]uch person

intentionally causes the death of another person. . . ." Ariz.Rev.Stat.Ann. § 13-1104(A)(1) (1978). The critical distinction between first and second degree murder is the element of premeditation. *State v. Walton,* 133 Ariz. 282, 650 P.2d 1264, 1271 (Ariz.Ct.App.1982). The statutory definition of premeditation is "that the defendant acts with either the intention or the knowledge that he will kill another human being, when such intention or knowledge precedes the killing by a length of time to permit reflection." Ariz.Rev.Stat.Ann. § 13-1101(1) (1978). Under Arizona case law, premeditation exists when " 'the defendant made a decision to kill prior to the act of killing, [and] "a plan to murder was formed after the matter had been made a subject of deliberation and reflection." ' " *State v. Kreps,* 146 Ariz. 446, 706 P.2d 1213, 1216 (1985) (quoting *State v. Lacquey,* 117 Ariz. 231, 571 P.2d 1027, 1030 (1977) (quoting *Macias v. State,* 36 Ariz. 140, 283 P. 711, 715 (1929))). The essence of premeditation is the reflective intent to kill. *Walton,* 650 P.2d at 1271.

There was abundant, clear, persuasive evidence of premeditation in the case. The most probative evidence of premeditation was the testimony of Kent Spillman, a psychologist at the Arizona State Prison. The state called Spillman as a rebuttal witness, after appellant had testified that he did not remember attacking Ponciano. Spillman testified that he interviewed appellant on the afternoon of October 4, 1978, several hours after Ponciano was killed, at which time appellant confessed to the crime. Spillman testified that appellant told him that he was angry at Ponciano because Ponciano drank his Kool-Aid and did not wake him for lunch. According to Spillman, appellant admitted killing Ponciano, described the crime

in graphic detail, and also volunteered that the crime was, in his own words, "premeditated." Appellant told Spillman that he made a garrotte from a torn bed sheet and he had a knife. Early in the morning on October 4, 1978, he woke Ponciano and strangled him, and then stabbed him several times to make sure he was dead. Appellant did not remember carving "Bonzai" in Ponciano's back but said he did not have time to carve a swastika. Finally, appellant told Spillman that after killing Ponciano, he uttered "Bonzai" and said "You won't drink my Kool-Aid again."

Spillman's testimony and circumstances which served to confirm it were probative of premeditation, but the jury was free, nevertheless, to disbelieve it. And it is not simply a case of refusing to credit one state witness, for the defendant offered affirmative testimony to contradict Spillman and medical evidence that pointed to a sudden and impulsive act, as distinct from a premeditated one. At trial appellant admitted that he spoke to Spillman on October 4 but denied making the confession or using the word "premeditated." Appellant accused Spillman of lying. Credibility of the witnesses is for the jury to determine, and a jury could find appellant's testimony truthful, thus discrediting the confession.

The state is correct that appellant himself testified that on October 3 he was mad at Ponciano because Ponciano drank his Kool-Aid and did not wake him up for lunch. Appellant further testified that when Ponciano drank his Kool-Aid, appellant "felt like" hurting him. However, in light of the evidence that appellant suffered from a brain disorder that gave rise to episodes of impulsive aggression, that he was angry at Ponciano and

may have wanted to hurt him shortly after lunch time on October 3 does not inevitably imply that his anger led him to kill some fifteen hours later.

There was considerable evidence of appellant's abnormal and violent behavior. Appellant testified that he had scars from self-mutilation, and that he had stabbed and shot several people before his incarceration at the Arizona State Prison. There was testimony that prison authorities had repeatedly disciplined appellant for aggressive conduct. Appellant recently had been convicted of stabbing a fellow inmate, and he regularly carried and used weapons in the prison. Other inmates testified that appellant periodically engaged in bizarre episodes during which he screamed and made animal-like sounds, and punched and beat his head against the walls of his cell. The inmates testified that these episodes erupted spontaneously and for no apparent reason. During these disturbances, appellant was violent and appeared not in control of himself. There was testimony that appellant had a short temper and had spontaneously triggered several fistfights. Two inmates testified they would be reluctant to share a cell with appellant, suggesting they feared his violent outbursts. This testimony is consistent with a sudden act of violence, without premeditation.

Dr. Paul Bindleglas, a psychiatrist who conducted a pretrial mental status examination and testified for the defense, attributed appellant's aggressive behavior to a brain disorder related to an epileptic condition. Dr. Bindleglas testified that appellant's history of epilepsy was well documented, and that appellant had a history of epileptic seizures. Dr. Bindleglas stated that in his opinion an electroencephalogram showed that appellant suffered from a

lesion of the left temporal lobe of the brain. He explained that such lesions are known to produce episodes of aggression and can give rise to seizures, and that the temporal lobe is closely related to aggression and hostility. Dr. Bindleglas noted that after medical authorities at the Arizona State Prison terminated appellant's epilepsy medication in 1977, appellant performed acts of self-multilation and engaged in repeated episodes of impulsive aggression and violence toward others. He opined that appellant's aggressive behavior after his medication was terminated was related to the lesion. Dr. Bindleglas concluded that appellant suffered from a seizure disorder of the left temporal lobe and may have been under the influence of a seizure when he killed Ponciano. According to Dr. Bindleglas, there was a strong possibility that appellant killed Ponciano after waking from his sleep in a state of post-epileptic confusion.

Dr. Bindleglas' testimony was replete with references to appellant's impulsive behavior. The Arizona Supreme Court has held that the tendency to act on impulse is probative of an absence of premeditation. *State v. Christensen,* 129 Ariz. 32, 628 P.2d 580, 582-83 (1981). Dr. Bindleglas testified on direct examination that the termination of appellant's epilepsy medication precipitated "characteristic impulsive episodes of violence. . . ." He repeated: "These were impulsive episodes of violence." On cross-examination Dr. Bindleglas reiterated that appellant "became more aggressive and impulsive towards other people" after his medication was terminated. He added that appellant experiences "impulses to his emotion center [that cause] intense feelings of rage and aggression. . . ." In addition, Dr. Bindleglas stated that appellant's "nor-

mal personality is one in which there is considerable hostility and aggressiveness," and opined that the killing occurred when appellant was "in a nonalert mind with considerable confusion and without any cerebral inhibitions on his aggressive impulses."

The evidence of impulsive aggression and Dr. Bindleglas' testimony attributing appellant's conduct to an epileptic disorder might not have been persuasive to a jury, but if it were, it would allow a rational conclusion that the killing was not premeditated. The jury might have rejected the conclusion that appellant was insane but nevertheless credited the testimony to the extent it suggested appellant acted on impulse. A jury reasonably could find that appellant was under the influence of an epileptic episode when he killed Ponciano and that the disorder impaired his ability to reflect.

We recognize that evidence on lack of premeditation was not compelling. Dr. Bindleglas' testimony could be discredited in various ways, including evidence that appellant exhibited aggressive behavior before his epilepsy medication was terminated. The state's expert witnesses, Dr. Otto Bendheim and Dr. Maier Tuchler, testified that even if appellant suffered from epilepsy, an epileptic event could not have accounted for the crime. The garrotte made before the killing points to premeditation, but not necessarily so. A jury given the choice between first and second degree murder might well return a verdict of either first degree murder or second degree murder. Under the Supreme Court's decisions in *Beck* and *Hopper*, due process required that the jury be given that choice.

The state does not argue that appellant's failure to request a lesser included offense instruction at trial pre-

cludes his contention in this habeas corpus proceeding that such an instruction was required. On direct review the Arizona Supreme Court did not invoke a procedural bar[1] and rejected appellant's contention on the merits. We are free to consider the issue despite appellant's not having requested an instruction at trial. *Bell v. Watkins*, 692 F.2d 999, 1003-04 (5th Cir.1982) (reaching merits of *Beck* claim where state supreme court had considered the issue on direct review), *cert. denied*, 464 U.S. 843, 104 S.Ct. 142, 78 L.Ed.2d 134 (1983); *see Huffman v. Ricketts*, 750 F.2d 798, 800-01 (9th Cir.1984) (federal review not barred where higher state court has addressed the merits of a constitutional claim).

Appellant's conviction of first degree murder violates due process under the principles set forth in the *Beck* and *Hopper* decisions. We reverse the district court's denial of appellant's petition for a writ of habeas corpus. The district court shall enter an order granting a writ of habeas corpus unless the state commences further proceedings against appellant within a time the district court deems reasonable.

REVERSED.

REINHARDT, Circuit Judge, concurring.

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1. *Miller v. Stagner*, 757 F.2d 988, 993, *modified*, 768 F.2d 1090, 1091 (9th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986), as we read the case, does not hold that failure to give the instruction sua sponte is a due process violation that survives a state procedural bar and necessarily becomes reversible error in a federal habeas proceeding. We do not consider that issue to have been presented in *Miller*, and we do not reach it here.

I concur fully in the majority opinion, with the exception of footnote 1 which I consider dictum. I write separately to emphasize one point. As the opinion expressly notes, defense counsel failed to request a second degree murder instruction. Thus, the opinion necessarily holds that in a capital case where the evidence warrants a lesser included offense instruction but counsel fails to request that instruction, due process requires that the court give the instruction *sua sponte*. This holding does not represent any change in the law in our circuit. We have said essentially the same thing previously in *Miller v. Stagner*, 757 F.2d 988, 993, *modified*, 768 F.2d 1090, 1091 (9th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986). Nevertheless, the principle is important and I believe it desirable to restate it explicitly. The question of whether a similar due process claim would survive any particular state procedural bar is not before us. Arizona raises no claim that any procedural bar exists here.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2396

D.C. No. C-83-2027-PHX-WPC

ROBERT WAYNE VICKERS,

Petitioner-Appellant,

vs.

JAMES T. RICKETTS, et al.,

Respondents-Appellees.

Appeal from the United States District Court
for the District of Arizona

ORDER

Before: KENNEDY, REINHARDT, and BRUNETTI, Circuit Judges.

The petition for rehearing is DENIED.

No. 86-688

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JAMES G. RICKETTS, et al.,
Petitioners,

VS.

ROBERT WAYNE VICKERS,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the failure to instruct the jury on second degree murder in a capital case violate due process under *Beck v. Alabama*, 447 U.S. 625 (1980) where, under both state and federal law, there was evidence negating premeditation sufficient to permit a jury rationally to render a verdict of second degree murder?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES
CASES

TABLE OF AUTHORITIES
CASES

Statutes

Other Authorities

No. 86-688

In the Supreme Court

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Respondent was tried in the Pinal County Superior Court in Arizona for the homicide of his cellmate at Arizona State Prison. In defense, Respondent presented evidence through lay and expert witnesses of his mental instability. As described by Judge Kennedy writing for the Court of Appeals below:

> There was considerable evidence of appellant's abnormal and violent behavior. Appellant testified that he had scars from self-mutilation, and that he had stabbed and shot several people before his incarceration at the Arizona State Prison. There was testimony that prison authorities had repeatedly disciplined appellant for aggressive conduct. Appellant recently had been convicted of stabbing a fellow

inmate, and he regularly carried and used weapons in the prison. Other inmates testified that appellant periodically engaged in bizarre episodes during which he screamed and made animal-like sounds, and punched and beat his head against the walls of his cell. The inmates testified that these episodes erupted spontaneously and for no apparent reason. During these disturbances, appellant was violent and appeared not in control of himself. There was testimony that appellant had a short temper and had spontaneously triggered several fistfights. Two inmates testified they would be reluctant to share a cell with appellant, suggesting they feared his violent outbursts. This testimony is consistent with a sudden act of violence, without premeditation.

Dr. Paul Bindleglas, a psychiatrist who conducted a pretrial mental status examination and testified for the defense, attributed appellant's aggressive behavior to a brain disorder related to an epileptic condition. Dr. Bindleglas testified that appellant's history of epilepsy was well documented, and that appellant had a history of epileptic seizures. Dr. Bindleglas stated that in his opinion an electroencephalogram showed that appellant suffered from a lesion of the left temporal lobe of the brain. He explained that such lesions are known to produce episodes of aggression and can give rise to seizures, and that the temporal lobe is closely related to aggression and hostility. Dr. Bindleglas noted that after medical authorities at the Arizona State Prison terminated appellant's epilepsy medication in 1977, appellant performed acts of self-mutilation and engaged in repeated episodes of impulsive aggression and violence toward others. He opined that appellant's aggressive behavior after his medication was terminated was related to the lesion. Dr. Bindleglas concluded that appellant suffered from a seizure disorder of the left temporal lobe and may have been under the influence of a seizure when he killed Ponciano. According to Dr. Bindleglas, there was a strong possibility that appellant killed Ponciano after waking from his sleep in a state of post-epileptic confusion.

> Dr. Bindleglas' testimony was replete with references to appellant's impulsive behavior. The Arizona Supreme Court has held that the tendency to act on impulse is probative of an absence of premeditation. *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580, 582-83 (1981). Dr. Bindleglas testified on direct examination that the termination of appellant's epilepsy medication precipitated "characteristic impulsive episodes of violence. . . ." He repeated: "These were impulsive episodes of violence." On cross-exmination Dr. Bindleglas reiterated that appellant "became more aggressive and impulsive towards other people" after his medication was terminated. He added that appellant experiences "impulses to his emotion center [that cause] intense feelings of rage and aggression. . . ." In addition, Dr. Bindleglas stated that appellant's "normal personality is one in which there is considerable hostility and aggressiveness," and opined that the killing occurred when appellant was "in a nonalert mind with considerable confusion and without any cerebral inhibitions on his aggressive impulses."

Respondent also testified as to periods when he lost control of his conduct. (Excerpt of Record, 1745-47, 1750)

The state's case against Respondent was based largely on circumstantial evidence: prison guards described the circumstances surrounding the discovery of the victim's death, the autopsy report described the cause of death as strangulation, and two experts stated they did not believe Respondent was legally insane at the time of the homicide. The sole direct evidence of Respondent's mental state at the time of the crime was the testimony of an unlicensed prison psychologist, Kent Spillman, who described a confession allegedly made by Respondent hours after the homicide. Spillman testified that Respondent admitted the killing was "premeditated." Respondent vigorously contested Spillman's testimony at trial, and denied the alleged confession. (Excerpt of Record, 1744-45, 1757, 1766)

The jury was instructed on first degree murder and insanity. The jury was not given the option of second degree murder. After

the jury rendered a verdict of first degree murder, the trial judge sentenced Respondent to death.

On direct appeal, the Arizona Supreme Court recognized the trial court's failure to give the lesser-included offense jury instruction on second degree murder would normally violate due process under *Beck v. Alabama*, 447 U.S. 625 (1980). It found, however, that reversal was not required in this case because "the uncontested facts show the *opportunity* to reflect or premeditate" the killing, and thus there was no evidence to support an instruction on second degree murder. *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315, 322 (1981) (emphasis added).

After exhausting state post-conviction remedies, Respondent filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition challenged the constitutionality of his conviction and death sentence on a number of grounds, including: (1) denial of due process resulting from the trial court's refusal to allow the court-appointed defense psychiatrist to obtain a battery of diagnostic psychological and neurological tests necessary to complete and confirm his evaluation of Respondent's mental disorders; (2) ineffective assistance of court-appointed counsel, a confirmed alcoholic who failed to conduct any meaningful investigation in preparing the defense and who was totally ignorant of rudimentary substantive and procedural laws central to Respondent's defense; and (3) denial of due process because of the trial court's failure to give the jury the option of second degree murder. The District Court denied an evidentiary hearing and dismissed the writ based in part upon an *ex parte* communication. Respondent appealed to the Ninth Circuit.

The panel, per Judge Anthony M. Kennedy, noting that some of Respondent's other contentions "raise substantial questions", unanimously reversed on the basis of the due process violation under *Beck v. Alabama*, 447 U.S. 625 (1980) and *Hopper v. Evans*, 456 U.S. 605 (1982). Petitioners' petition for rehearing was denied. Petitioners did not seek rehearing *en banc*, but instead filed the Petition for Writ of Certiorari herein.

SUMMARY OF ARGUMENT

This case is not appropriate for review by this Court. The Court of Appeals correctly determined that Respondent was entitled to a lesser included offense instruction under *Beck, supra,* and *Hopper, supra.* Contrary to Petitioners' assertions, the federal Due Process and Arizona standards governing when a lesser included offense instruction is required are identical. Therefore, this case does not present the issue of which standard governs federal habeas corpus review of state convictions. Moreover, under any standard, the determination by the Court of Appeals that the unique circumstances of the case required such an instruction is unassailable.

Similarly, this case does not present the issue of what deference, if any, is due to a state court determination on this issue. The Arizona court's ruling that no second degree murder instruction was required is without any support in the trial record, and it applied an unconstitutional presumption. The Arizona court was therefore wrong under any standard. Finally, as a matter governed by federal Due Process standards, no deference to such a determination is required.

REASONS FOR DENYING THE WRIT

I.

FEDERAL AND ARIZONA STANDARDS REGARDING ENTITLEMENT TO A LESSER OFFENSE INSTRUCTION ARE IDENTICAL, AND THE COURT OF APPEALS' DETERMINATION THAT THE JURY SHOULD HAVE BEEN GIVEN THE CHOICE OF A SECOND DEGREE MURDER VERDICT WAS CORRECT UNDER EITHER STANDARD.

Contrary to Petitioners' assertion, the petition herein does not raise any important questions of federalism. It only concerns the correctness of the Court of Appeals' assessment of the trial record in determining whether, under the unique facts of this case, Respondent's federal due process right was violated.

At the outset it should be noted that there is nothing unique or unusual about Arizona law that requires an evaluation of its consistency with the federal constitution. This case does *not* involve a dispute as to the interpretation or constitutionality of state substantive law defining criminal offenses. Petitioners agree that the difference between first and second degree murder under Arizona law is premeditation—*i.e.*, when "the defendant made a decision to kill prior to the act of killing, [and] 'a plan to murder was formed after the matter had been made a subject of deliberation and reflection.' " *State v. Kreps*, 146 Ariz. 446, 706 P.2d 1213, 1216 (1985) (quoting *State v. Lacquey*, 117 Ariz. 231, 571 P.2d 1027, 1030 (1977) (quoting *Macias v. State*, 36 Ariz. 140, 283 P. 711, 715 (1929)). "The essence of premeditation is the reflective intent to kill." *State v. Walton*, 133 Ariz. 282, 650 P.2d 1264, 1271 (Ariz.Ct.App. 1982). Arizona law requiring premeditation as an element of first degree murder is in accord with common law and definitions long established in other jurisdictions. *See United States v. Frady*, 456 U.S. 152, 170-171 n.18 (1982); *Fisher v. United States*, 328 U.S. 463, 469-70 n.3 (1946); W. LaFave & A. Scott, *Criminal Law*, Section 73 (1972).

Nor does this case concern the constitutionality of the standard by which the Arizona courts determine whether there is sufficient evidence to warrant the giving of a lesser offense jury instruction. Petitioners agree that a second degree murder instruction must be given where "the evidence reasonably construed . . . tend[s] to show lack of premeditation." *State v. Moreno*, 128 Ariz. 257, 625 P.2d 320, 324 (1981). "The presence of such evidence is dispositive." *Id. See State v. McIntyre*, 106 Ariz. 439, 477 P.2d 529 (1970); *State v. Sorensen*, 104 Ariz. 503, 455 P.2d 981 (1969); *Singh v. State*, 35 Ariz. 432, 280 P. 672, 677 (1929). This standard is indistinguishable from the federal standard described in *Beck*, *supra*, 447 U.S. at 635 and *Hopper*, *supra*, 456 U.S. at 611-12. The federal rule is that the lesser included offense instruction must be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). Like Arizona law, the instruction must be given if there is "any evidence which tended to show such a state of facts

as might bring the crime within the grade" of the lesser offense. *Stevenson v. United States*, 162 U.S. 313, 314 (1896).

Under both Arizona and federal law, evidence supporting a lesser offense instruction may be established directly or indirectly through inference based on circumstantial evidence. *See United States v. Comer*, 421 F.2d 1149, 1154 (D.C. Cir. 1970); *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981); *State v. Hicks*, 133 Ariz. 64, 649 P.2d 267, 274 (1982). Moreover, under both Arizona and federal law, in determining whether a jury rationally could render a verdict on the lesser offense, the jury is entitled to disbelieve any witness or may choose to disbelieve part of a witness' testimony and draw its own inferences therefrom. *See Stevenson v. United States, supra*, 162 U.S. at 322; *United States v. Comer, supra*, 421 F.2d at 1155; *State v. Ramos*, 108 Ariz. 36, 492 P.2d 697, 699 (1972); *Nevarez v. State*, 22 Ariz. 237, 196 P. 449, 450 (1921); *Singh v. State, supra*, 35 Ariz. 432, 280 P. at 677. "[T]he jury might fairly infer the lesser offense from the evidence presented, 'including a reconstruction of events gained by accepting the testimony of one or more witnesses only in part.' [Citations omitted]" *United States v. Liefer*, 778 F.2d 1236, 1246 (7th Cir. 1985).

A. Because the Arizona standard is identical to the federal rule in every relevant respect, this case does not present the issue Petitioners contend was reserved by this Court in *Hopper*—whether the evidence is sufficient to warrant the giving of a second degree murder instruction in a capital case is measured in the first instance by state or federal law.[1]

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[1] In *Hopper*, this Court compared the Alabama and federal rules. 456 U.S. at 611-12. Under Alabama law, the lesser offense instruction is given if "there is any reasonable theory from the evidence which would support the position." *Hopper, supra*, 456 U.S. at 611, *quoting, Fulghum v. State*, 291 Ala. 71, 75, 277 So.2d 886 (1973). There is no substantive distinction between the Alabama and federal rules. Accordingly, the Court found the Alabama rule did not "offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases." *Id.* Since the rules were substantively identical, it was immaterial to the due process guarantees of *Beck* whether state or federal law applied.

B. Under either Arizona or federal standard, the Court of Appeals' conclusion that the evidence supported a jury instruction on second degree murder was correct. There was an abundance of lay and expert evidence in the trial record as to Respondent's impulsive behavior and sudden outbursts of violence, all of which tended to negate premeditation. Although there was evidence which would have supported a finding of premeditation, it simply cannot be said that a rational jury, deciding for itself questions of credibility and drawing inferences it deemed probable, could not have reached a verdict of second degree murder.

The Court of Appeals, per Judge Kennedy, properly found:

> The evidence of impulsive aggression and Dr. Bindleglas' testimony attributing appellant's conduct to an epileptic disorder might not have been persuasive to a jury, but if it were, it would allow a rational conclusion that the killing was not premeditated. The jury might have rejected the conclusion that appellant was insane but nevertheless credited the testimony to the extent it suggested appellant acted on impulse. A jury reasonably could find that appellant was under the influence of an epileptic episode when he killed

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If, however, a state rule imposed a barrier to a lesser offense instruction which was more stringent than the federal rule, there would be a reason not to apply the less protective state standard. While a state is free to define the elements of a crime, once it does, due process requires the state to prove each element beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197, 210, 215 (1977). Where, as in Arizona and most other jurisdictions, premeditation is the substantive element of first degree murder which distinguishes it from second degree murder, the state is required by due process to prove premeditation beyond a reasonable doubt. *See State v. Lacquey*, *supra*, 117 Ariz. 231, 571 P.2d at 1029-30. Thus due process requires the giving of a lesser-included offense instruction if the defendant produces evidence which a rational jury could find raises a reasonable doubt as to premeditation. The imposition of a "super barrier" to the giving of the lesser offense instruction would be inconsistent with *Mullaney* and *Hopper*. Since Alabama law did not present such a barrier, this Court was not required to address this issue in *Hopper*. Similarly, because the Arizona standard is indistinguishable from the federal rule, the issue is not presented in this case.

Ponciano and that the disorder impaired his ability to reflect.[2]

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[2] Contrary to Petitioners' contention, Respondent's primary defense of insanity did not preclude an instruction on second degree murder. The Arizona Supreme Court on direct appeal made no such finding; it only ruled that if Respondent were sane, the circumstances of the crime were such that it must have been premeditated. 633 P.2d at 322. The nature of Respondent's mental disorder as described at trial was not inherently inconsistent with a finding of second degree murder, because the severity and effect of the disorder were matters of degree, presenting a continuum of varying impairment to consciousness, volition, and judgment. Indeed, since Arizona has adopted the narrow M'Naughten rule of insanity requiring a defect of reason from disease of the mind so as not to know the nature and quality of the act or that what he was doing was wrong (*State v. Doyle*, 117 Ariz. 349, 572 P.2d 1187, 1189 (1977)), there is substantial room for the jury to decide between the polar extremes of legal insanity and premeditated murder. Here, for example, the jury could have concluded that Respondent was legally sane in that he was aware of the nature of his conduct, and yet was sufficiently impaired so that he could not control his impulse.

State v. Schroeder, 95 Ariz. 255, 389 P.2d 255 (1964), *cert. denied*, 379 U.S. 939 (1964) cited by Petitioners does not hold to the contrary. *Schroeder* merely held that where the state of the evidence is such that the "defendant can only be guilty of the crime charged or not guilty at all," a lesser offense instruction need not be given. The defendant's alibi in *Schroeder* is one such example. Although some insanity theories may be utterly inconsistent with a lesser offense, as where the defendant admits to premeditation but contends that as a result of paranoid schizophrenia he believed he was morally right, not all insanity theories are inconsistent with second degree murder.

Accordingly, in *State v. Harwood*, 110 Ariz. 375, 519 P.2d 177, 182 (1974), the Arizona Supreme Court distinguished *Schroeder* in reversing a murder conviction. Although the defendant asserted an insanity defense, the court held that the trial court was required to give a jury instruction on the lesser offense of manslaughter.

II.

THIS IS NOT A PROPER CASE TO DETERMINE THE MEASURE OF DEFERENCE, IF ANY, WHICH IS DUE TO THE STATE COURT'S DETERMINATION THAT A LESSER OFFENSE INSTRUCTION WAS NOT WARRANTED BY THE EVIDENCE: UNDER ANY MEASURE THAT DETERMINATION WAS CLEARLY WRONG.

Petitioners fault the Court of Appeals' decision because of its alleged failure to afford the Arizona Supreme Court's conclusion a "presumption of correctness." But the Court of Appeals' careful assessment of the trial record in finding sufficient evidence to warrant a second degree murder instruction did not offend any applicable presumption of correctness for two reasons. First, no such presumption is due because that determination is a matter of federal constitutional law, not historical facts. Second, even if such a presumption were due, any such presumption was overcome in this case.

A. Whether sufficiency of evidence is to be measured in the first instance against state or federal standard, the ultimate determination as to whether due process is violated under *Beck v. Alabama* is a question of federal constitutional law determinable by the federal courts. *Cf. Jackson v. Virginia*, 443 U.S. 307 (1979) (due process requires federal habeas court to determine whether there is sufficient evidence to permit any rational trier of the fact to find guilt of crime beyond a reasonable doubt); *Thompson v. Louisville*, 362 U.S. 199 (1960) (state court conviction violates due process where there is no evidence supporting conviction). Thus, in *Hopper v. Evans*, this Court, rather than requiring remand to the Alabama courts, *itself* reviewed the trial evidence in determining there was not sufficient evidence to warrant a lesser offense instruction. 456 U.S. at 612-13.

Moreover, as this Court recently noted in *Rose v. Clark*, 478 U.S. ____, 106 S.Ct. 3101, 92 L.Ed.2d 460, 469-470 (1986), the question as to whether the trial evidence warranted a lesser-included offense instruction under *Beck* and *Hopper* may be characterized as a species of harmless error analysis. In *Rose*, this Court enumerated various contexts in which the harmless error

test of *Chapman v. California*, 386 U.S. 18 (1967) has been applied. The Court referred to *Hopper v. Evans* as a case "citing *Chapman*, and finding no prejudice from trial court's failure to give lesser-included offense instruction." 92 L.Ed.2d at 470. Harmless error under *Chapman* is, of course, a question of federal law reviewable by the federal courts. *Chapman v. California*, *supra*, 386 U.S. at 21; *Fontaine v. California*, 390 U.S. 593 (1968); *Fahy v. Connecticut*, 375 U.S. 85 (1963); *Connecticut v. Johnson*, 460 U.S. 73, 81 n.9 (1983).[3]

The propriety of federal review in this instance is not only necessitated by the fact that harmless error evaluation is inextri-

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[3] Independent federal review of sufficiency of evidence and harmless error is entirely consistent with a wide variety of other contexts in which the federal courts resolve questions of federal law even when it is necessary to refer to state laws, procedures and norms. For instance, federal courts determine: whether state law creates an entitlement to property or liberty protectible by the Due Process Clause; (*Vitek v. Jones*, 445 U.S. 480, 490-91 (1980); *Arnett v. Kennedy*, 416 U.S. 134, 166-67, 177-78, 210-11 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); whether Double Jeopardy bars a second prosecution for the "same offense" as defined by state law (*Brown v. Ohio*, 432 U.S. 161, 166 (1977); *Pryor v. Rose*, 724 F.2d 525, 528 (6th Cir. 1984)); whether counsel provided effective assistance, a determination potentially made in reference to prevailing local norms of professional practice (*Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Evans v. Meyer*, 742 F.2d 371, 373-74 (7th Cir. 1984)); whether state court jury instructions created a permissive or mandatory inference in the minds of the jury (*Francis v. Franklin*, 471 U.S. 307, 85 L.Ed.2d 344, 354 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979)); whether evidence wrongfully withheld by the government in a criminal prosecution is material to state court convictions (*Chaney v. Brown*, 730 F.2d 1334, 1341 n.10, 1349 (10th Cir. 1984)); whether the state court's failure to vindicate a defendant's constitutional rights is supported by an independent and adequate state ground (*James v. Kentucky*, 466 U.S. 341 (1984); *Barr v. Columbia*, 378 U.S. 146, 149 (1964)); and whether there are state remedies available to be exhausted before the federal court will consider a habeas petition (28 U.S.C. § 2254(b) & (c); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971).

cable from enforcement of federal constitutional guarantees; it is also consistent with sound judicial policy.

Harmless error inquiry depends upon a host of factors "all [of which are] readily accessible to reviewing courts." *Delaware v. Van Arsdall*, 475 U.S.____, 106 S.Ct. 1431, 89 L.Ed.2d 674, 686 (1986). This is particularly true with respect to the determination whether the trial evidence was sufficient to warrant a lesser offense instruction, since that determination is based solely on review of the trial record. The state appellate court's ruling on such an issue is not based upon credibility determinations or findings of historical fact which underlie the presumption of correctness under 28 U.S.C. § 2254(d). *See Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963). It turns merely upon review of the trial record, much like review of a directed verdict or judgment notwithstanding the verdict. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure*, §§ 2574 & 2536 (1971). The federal courts on habeas review are well equipped to make that assessment.[4] The judgment exercised by the Court of Appeals in this case was well within the realm of traditional judicial experience of determining whether there was enough evidence at trial to go to the jury.

B. Independent federal review of the sufficiency of the evidence under *Beck*, whether measured against state or federal standards, does not offend principles of federalism for several reasons. First, *Beck* has been applied by this Court only to capital cases. Second, in contrast to *Jackson v. Virginia, supra*, 443 U.S. 307, review under *Beck* does not entail a "second appeal" or second guessing of findings made by the state trier of fact. Review is limited to an assessment of the trial record to determine whether the jury was wrongfully deprived of the choice of a lesser-included offense in capital cases. Third, unlike *Jackson v. Virginia*, the potential for review under *Beck* does not obtain in every criminal case or even every capital case; it applies only to

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[4] This is particularly true where, as here, that determination did not turn on any nuances peculiar to state law—Arizona and federal law are identical in all relevant respects.

the relatively rare instance in which the state trial court fails to give a lesser-included offense instruction in a capital case.[5]

C. Finally, even if it is assumed a state court's determination that the evidence did not warrant a second degree murder instruction is entitled to a "presumption of correctness" such as that under 28 U.S.C. § 2254(d), any such presumption cannot be sustained in this case for two reasons. First, it was not fairly supported by the record. Second, the reasoning of the Arizona Supreme Court in reaching its conclusion was constitutionally defective.

As previously discussed, there was abundant trial evidence of Respondent's mental disorders and propensity for impulsive violence upon which a jury could have based a verdict of second degree murder. The Arizona Supreme Court's rejection of Respondent's claim under *Beck* failed fully and logically to account for this evidence. The court reasoned that the fact that Respondent fashioned a garrote to strangle the victim and after causing the death, stabbed and mutilated the body implied Respondent had "the opportunity to reflect or premeditate." *State v. Vickers*,

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[5] Since *Beck* was decided, there have been only 10 published decisions of lower federal courts which reviewed a challenge to the sufficiency of the trial evidence in a capital case. *See Aldrich v. Wainwright*, 777 F.2d 630, 637 (11th Cir. 1985); *Miller v. Stagner*, 757 F.2d 988 (9th Cir. 1985) ____ U.S. ____, *amended*, 768 F.2d 1090, 1091 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1269 (1986); *Briley v. Bass*, 742 F.2d 155, 165 (4th Cir. 1984); *Bell v. Watkins*, 692 F.2d 999, 1004 (5th Cir. 1982), *cert. denied*, 464 U.S. 843 (1983); *Johnson v. Thigpen*, 623 F.Supp. 1121, 1131 (S.D. Miss. 1985); *Ritter v. Smith*, 568 F.Supp. 1499, 1503 (S.D. Ala. 1983), *modified*, 726 F.2d 1505 (11th Cir. 1984), *cert. denied*, 469 U.S. 869, 105 S.Ct. 218 (1984); *Jones v. Thigpen*, 555 F.Supp. 870, 876 (S.D. Miss, 1983), *modified*, 741 F.2d 805 (5th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1172 (1986); *Dobbert v. Strickland*, 532 F.Supp. 545, 558 (M.D. Fla. 1982), *aff'd*, 718 F.2d 1518 (11th Cir. 1983), *cert. denied*, 468 U.S. 1220 (1984); *United States ex rel. Brode v. Hilton*, 496 F.Supp. 619, 622 (D.C.N.J. 1980). Of these, only *one* (the case at bar) has reversed on the basis that there was sufficient evidence to mandate a lesser offense instruction under *Beck*. All others affirmed the conviction after reviewing the evidence.

129 Ariz. 506, 633 P.2d 315, 322 (1981). From this, the court concluded Respondent must have *actually* premeditated. Therein lies the flaw of the court's syllogism. The fact that Respondent may have had an "opportunity" to reflect and premeditate does *not* mean that he necessarily *did*, and the jury was free to find otherwise, particularly in view of the substantial evidence of Respondent's impulsive character. *See Fisher v. United States*, *supra*, 328 U.S. at 469-70 n.3; *LaFave* and *Scott*, *supra*, at p. 563. Thus, the state court's ruling was not "fairly supported by the record." 28 U.S.C. § 2254(d)(8).

Second, the Arizona Supreme Court's conclusive presumption of premeditation from the mere "opportunity" to premeditate is unconstitutional. The court's reasoning in affirming the trial court's failure to submit a second degree murder instruction to the jury had the net effect of directing a verdict of first degree murder, removing the issue of Respondent's state of mind from the jury, and relieving the state of its burden of proving premeditation beyond a reasonable doubt. Such a conclusive presumption violates rudimentary due process principles established in *Mullaney v. Wilbur*, 421 U.S. 684, 699-701 (1975), *Sandstrom v. Montana*, 442 U.S. 510, 521-24 (1979), and *In re Winship*, 397 U.S. 358 (1970). Indeed, the effect of *conclusively* presuming premeditation from the mere opportunity to premeditate is even more offensive to due process than the rebuttable inference condemned in *Sandstrom*.[6] Any presumption of correctness that might otherwise attach to the Arizona Supreme Court's conclusion that a second degree murder instruction was not warranted was completely undermined by the illogic and unconstitutionality of its reasoning.

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[6] The Arizona Supreme Court's rationale is also constitutionally suspect because there is no rational basis for the presumption. It cannot be said that the fact of premeditation "is more likely than not to flow from" the mere opportunity to premeditate, particularly where the defendant, like Respondent, is given to reflexive and impulsive acts of violence. *Leary v. United States*, 395 U.S. 6, 36 (1969). *See County Court of Ulster County v. Allen*, 442 U.S. 140, 165 (1979).

Accordingly, this is not the proper case to determine how much, if any, deference should be given to the state court's assessment of the sufficiency of the evidence under *Beck* and *Hopper* since under any standard, the assessment was clearly wrong in this case.

CONCLUSION

This Petition does not present issues worthy of the Writ. There is no conflict among the circuits to resolve. Nor are there important constitutional questions of national significance that need be addressed. This case does not involve the constitutionality of the state laws defining substantive elements of a crime or the standard of proof as it relates to submission of lesser offense instructions to the jury. Nor does it involve any significant question of federalism. It only involves the application of clear standards, identical under both state and federal law, to the unique facts of this individual case.

This is not a proper case to determine the precise measure of deference, if any, which should be accorded to a state court determination that the evidence was not sufficient under *Beck* and *Hopper* to warrant a lesser offense instruction. Under any standard, even the presumption of correctness under 28 U.S.C. § 2254(d), the determination by the state court in this case was clearly erroneous. The trial record carefully reviewed by the Court of Appeal below contained more than enough evidence to permit the jury to consider a verdict of second degree murder.

Finally, this Court should deny the Writ in the interests of justice and judicial economy. As noted *supra*, the Court of Appeal found that Respondent raised other substantial questions. Reversal of the Court of Appeals' decision will likely lead either to grant of habeas corpus on other grounds or remand to the District Court for an evidentiary hearing. Rather than prolonging adjudication in the federal court of the numerous substantial issues raised by Respondent's habeas petition, it would be far more expeditious and efficient to deny certiorari and cause Respondent to be retried in the state court on the merits within a reasonable period of time.

For all of the foregoing reasons, the Writ should be denied.

Dated: December 19, 1986

Respectfully submitted,

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